No. 02-1624

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, PETITIONERS

v.

MICHAEL A. NEWDOW, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
A.	Newdow lacks standing	2
B.	Petitioners' policy of leading willing elementary school students in the daily recitation of the Pledge of Allegiance is consistent with the Establishment Clause	8
	1. "Under God" is an acknowledgement of the historical influence of religion, not an endorsement of monotheism	9
	2. No unconstitutional coercion results	14
	3. Petitioners' Pledge policy has a secular purpose	18
Appendix		1a

TABLE OF AUTHORITIES

Cases:

Abington Sch. Dist. v. *Schempp*, 374 U.S. 203 (1963)	20
Allen v. *Wright*, 468 U.S. 737 (1984)	5
Ankenbrandt v. *Richards*, 504 U.S. 689 (1992)	8
Bennett v. *Spear*, 520 U.S. 154 (1997)	5
Bethel Sch. Dist. v. *Fraser*, 478 U.S. 675 (1986)	15
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990)	14
Board of Educ. v. *Pico*, 457 U.S. 853 (1982)	15, 19
Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995)	9, 10
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976)	8
Commonwealth v. *Beiler*, 79 A.2d 134 (Pa. Super. Ct. 1951)	11
County of Allegheny v. *ACLU*, 492 U.S. 573 (1989)	8, 10, 11, 19
Dickerson v. *United States*, 530 U.S. 428 (2000)	19

Cases—Continued: Page

District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 3, 8
Donahoe v. *Richards*, 38 Me. 379 (1854) 11
Doremus v. *Board of Educ.*, 342 U.S. 429 (1952) 7
Edwards v. *Aguillard*, 482 U.S. 578 (1987) 2, 8
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 12
Flast v. *Cohen*, 392 U.S. 83 (1968) 7
Good News Club v. *Milford Central Sch.*, 533 U.S. 98 (2001) 14, 15
Leavitt v. *Jane L.*, 518 U.S. 137 (1996) 4
Lee v. *Weisman*, 505 U.S. 577 (1992) 12, 15, 17
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 2, 6
Lynch v. *Donnelly*, 465 U.S. 668 (1984) ..... *passim*
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 7
McDaniel v. *Paty*, 435 U.S. 618 (1978) 19
McGowan v. *Maryland*, 366 U.S. 420 (1961) 18
McMillian v. *Monroe County*, 520 U.S. 781 (1997) 4
McMillan v. *State*, 265 A.2d 453 (Md. 1970) 11
Newdow v. *United States*, No. 99-4136 (11th Cir. Jan. 4, 2000) 10
People v. *DeJonge*, 501 N.W.2d 127 (Mich. 1993) 11
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) 3, 8
Sagar v. *Sagar*, 781 N.E.2d 54 (Mass. Ct. App.), review denied, 786 N.E.2d 395 (Mass.), cert. denied, 124 S. Ct. 228 (2003) 11
Salem Coll. & Academy, Inc. v. *Employment Div.*, 695 P.2d 25 (Ore. 1985) 11
Santa Fe Indep. Sch. Dist. v. *Doe*, 530 U.S. 290 (2000) 9, 12
State v. *Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001) 11
State v. *Pack*, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976) 11

Cases—Continued: Page

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 5
Stone v. *Graham*, 449 U.S. 39 (1980) 12
Texas v. *Johnson*, 491 U.S. 397 (1989) 14
United States v. *Seeger*, 380 U.S. 163 (1965) 11
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 5-6
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 18
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 19
Warth v. *Seldin*, 422 U.S. 490 (1975) 4
West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 14, 15, 16, 17
Wooley v. *Maynard*, 430 U.S. 750 (1977) 17
Zorach v. *Clauson*, 343 U.S. 306 (1952) 19

Constitution:

U.S. Const.:
Art. I, § 8, Cl. 1 7
Art. III 3, 5, 7
Amend. I 10
Amend. I (Establishment Clause) ..... *passim*
Amend. I (Free Exercise Clause) 17
Amend. I (Free Speech Clause) 16

Miscellaneous:

E. Freund & D. Givner, *Schooling, The Pledge Phenomenon & Social Control* (U.S. Dep't of Educ. Apr. 1975) 13
R. Hess & J. Torney, *The Development of Political Attitudes in Children* (1967) 13
Kansas State Dep't of Educ., *A Program for Providing Patriotic Exercises and Instructions for Flag Etiquette, Use, and Display* (Aug. 2001) 13

Miscellaneous—Continued: Page

New York State Comm'n on the Bicentennial of the U.S. Const., *Living Together Constitutionally: An Elementary Education Citizenship Guide Based on the Pledge of Allegiance* (S. Schechter & A. Gallagher eds., 1990) 13

C. Seefeldt, "*I Pledge . . .*", 58 Childhood Education 308 (May/June 1982) 13

The Papers of Benjamin Franklin (W. Wilcox, et al., eds., 1959) 11

In the Supreme Court of the United States

No. 02-1624

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, PETITIONERS

v.

MICHAEL A. NEWDOW, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

The central theme of respondent Newdow's (Newdow) and his amici's arguments is that voluntary recitation of the Pledge of Allegiance, with its reference to "one Nation under God," unconstitutionally coerces schoolchildren into professing faith in a monotheistic Judeo-Christian deity. The first problem with that argument is that there is no allegedly coerced schoolchild before this Court. There is only a father who lacks any legal right to control the educational or religious upbringing of his child, and therefore lacks standing.

The second problem is that Newdow's and his amici's arguments posit a sweeping and absolutist conception of unconstitutional coercion that, in practice, would leave no place in the public school classroom for official references to or acknowledgments of the role of religion in United States history. But Newdow's argument does not stop there. His insistence that "under God" is a governmental endorsement of Judeo-Christian monotheism reaches beyond the classroom and would require invalidation of the Pledge in any public setting.

Sustaining petitioners' Pledge policy, on the other hand, would require no such radical reordering of constitutional jurisprudence. The Court would have to do no more than reaffirm what two majority opinions and numerous individual opinions of Justices of this Court have said time and again: the Pledge of Allegiance is constitutional because the Establishment Clause permits official acknowledgment of the role that religion has played in the formation of the Nation's governmental institutions and continues to play in American life. Nothing in Establishment Clause jurisprudence or common sense requires that public school children be screened from those facts. See *Edwards* v. *Aguillard*, 482 U.S. 578, 606 (1987) (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage.").

A. NEWDOW LACKS STANDING

Newdow has failed to identify any injury in fact to a "legally protected interest" that both was caused by petitioners' Pledge policy (rather than the conduct of a third party not before the court), and that is likely to be redressed by a favorable decision. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

1. Petitioners' Pledge policy invades no "legally protected interest" of Newdow's. The state court has vested controlling legal authority over the child's education in the mother rather than in Newdow. Pet. App. 89; U.S. Br. 11-13. That authority includes the right to decide, over Newdow's objection, whether the child should recite the Pledge and whether to object to or acquiesce in the school district's Pledge recitation policy. U.S. Br. 12 (citing cases).

Newdow argues (Br. 39) that he was recently awarded "joint custody." But the state court's most recent custody order is explicit that the mother—not Newdow—retains controlling legal authority over the education and upbringing of the child. App., *infra*, 12a. Newdow has a right to expose his child to his atheistic viewpoint, including his opposition to the Pledge. Pet. App. 93. However, petitioners' Pledge policy, which takes place during school days when the mother has physical as well as controlling legal custody, see App., *infra*, 12a-13a, does not impair that right.[1]

Newdow claims (Br. 42) a right not to have "the government weigh[] in." But the government has not unilaterally interjected itself into a parental dispute; the child is exposed to petitioners' Pledge policy solely as a result of the independent decision of the parent with controlling legal custody to enroll the child in petitioners' school and to approve the child's recitation of the Pledge. The right to select a school with pedagogical practices that are consonant with her views, even if they conflict with Newdow's, is precisely the right afforded the mother by the state court custody order. Indeed, the custody order empowers the mother to take the child to church and would allow the mother to transfer the child to a pervasively religious school. Federal court litigation should not be used to undercut the mother's rights and federalize this family law dispute. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).[2]

---

[1] Newdow insists (Br. 39) that he has been "intimately involved in parenting his child since before her birth." The state court found exactly the opposite to be true. App., *infra*, 2a ("The first four years of the minor's life established a pattern of noninvolvement," and the "*Father admitted* that he did not believe it was necessary for him to be around that much during that period of the minor's life.") (emphasis added).

[2] Newdow asks this Court to defer (Br. 39) to the Ninth Circuit's construction of state law. The fact that a new state court order has issued since the Ninth Circuit's ruling, see App., *infra*, by itself renders deference inappropriate. That order, moreover, is explicit about the limited scope of Newdow's rights. The only remaining question is whether those rights are sufficient to establish Article III standing—and that is a question of federal law that this Court decides de novo. In any event, in

Beyond that, Newdow (Br. 42, 45-46) and his amici (Am. United Br. 6-7) repeat the court of appeals' error of grounding standing in Newdow's alleged right not to have his child subjected to *unconstitutional* governmental conduct. That generalized description of Newdow's injury invites circumvention of the mother's state-law right to decide whether the child recites the Pledge and, indeed, it would empower Newdow to ensure that *no student* says the Pledge in school. More fundamentally, standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). Newdow's declaration that petitioners' Pledge policy results in the "inculcation of Monotheism" (Br. 9, 42) thus does nothing to establish his right to sue. If the Pledge had such an effect (and it does not, see Section B, *infra*), the legal rights injured would be those of the child who is subject to the indoctrination and the mother who has legal control over the child's educational and religious upbringing.

It thus is not enough for Newdow to assert that the Pledge is unconstitutional and then claim a psychic injury

---

Leavitt v. *Jane L.*, 518 U.S. 137 (1996) (per curiam), this Court flatly rejected the notion that such deference is warranted. *Id.* at 145 ("[T]he courts of appeals owe no deference to district court adjudications of state law, * * * [so] surely there is no basis for regarding panels of circuit judges as 'better qualified' than we to pass on such questions."). In *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), the Court appeared to backtrack. *Id.* at 786-787. The Court need not grapple with the deference question in this case, however, because the court of appeals predicated standing on additional rights that it concluded "surely" (Pet. App. 94) must follow from Newdow's specific rights—such as the perceived right to exclude allegedly unconstitutional communications expressly chosen by the mother. In so doing, the Ninth Circuit "plainly" overreached, rendering any rule of deference to be "obviously inapplicable." *Leavitt*, 518 U.S. at 145; see Grodin Amicus Br. 11 (court of appeals "extrapolat[ed] well beyond what California's courts have thus far held"). For those same reasons, the Court should reject the suggestion of amicus Grodin that the case be certified to the California Supreme Court.

from the recitation of an unconstitutional Pledge. To establish standing, Newdow must identify an injury to a legally protected right that exists even if (as the United States contends) the Pledge is constitutional. Newdow, however, offers no authority for the proposition that, even if the Pledge policy is lawful, he retains a state-law right to trump the mother's decision to expose the child to the Pledge in school.

Newdow attempts (Br. 45) to articulate an Article III injury in terms of the child being taught that his views are those of an "outsider." But that argument proves too much because any "minor relative[]" (Freethought Br. 25)—indeed, any atheist, agnostic, deist, or pantheist—could claim that same injury. *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984) ("If the abstract stigmatic injury were cognizable, standing would extend nationwide."). Furthermore, public schools routinely instruct students about evolution, war, racial integration, gender equality, and other matters with which some parents may disagree on religious, political, or moral grounds, and thus schools may convey indirectly to children that a parent's views are those of an "outsider." But nothing in Establishment Clause jurisprudence vests every parent of every schoolchild with a legal right to insist that the school's teachings comport with his or her viewpoints.

2. Even if Newdow's perceived "outsider" status were a legally cognizable injury, he would have to show that it is petitioners' Pledge policy, rather than the "*independent* action" of the mother in rejecting Newdow's views, that caused that harm. *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). He also must show that it is "likely," *Lujan*, 504 U.S. at 561, that his injury will be redressed by a favorable court ruling in a "tangible" way, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*,

454 U.S. 464, 477 (1982). Newdow, however, expressly refused to address those issues in his brief. Newdow Br. 39 n.59. Yet his lengthy discussion of the manifold social forces that have, in his view, subjected atheists to "pervasive prejudice" and left them "among the most consistently, flagrantly and officially disenfranchised minorities in our society" (*id.* at 24), highlights Newdow's causation and redressability problems. If there is such "pervasive prejudice," it is highly unlikely that deleting a revision in the Pledge of Allegiance will redress his perceived "outsider" status, especially in the face of the mother's express disagreement with his views on both religion and the value of having the child recite the Pledge.

3. Newdow's attempt (Br. 47-49) to ground standing in his alleged status as a classroom volunteer founders in two respects. First, nothing in the record substantiates his claimed status as a classroom volunteer. The complaint states only that "at times" he has attended "and will in the future attend" class with his daughter. J.A. 49. The allegation that Newdow "had visited" the classroom in the past "proves nothing," and likewise the general "profession of an 'inten[t]' to return to the places [he] had visited before * * * is simply not enough" to establish the requisite concrete, particularized, and imminent violation of legal rights. *Lujan*, 504 U.S. at 564.

Second, Newdow's generalized assertion of an intent to visit the classroom does nothing to enhance his parental rights under California law. To the extent he asserts standing to sue "as an object of the [Pledge policy]" himself (Br. 47), his argument goes beyond the question presented, which is limited to his standing to challenge petitioners' policy of leading "willing students"—not adults who happen to be present—in reciting the Pledge.

Newdow's claim to taxpayer standing (Br. 49-50) fares no better. Newdow does not reside within nor does he pay

taxes to petitioner Elk Grove School District. Newdow Br. 49 n.70; Pltf. Opp. to Def. Mot. to Dismiss 13 (Apr. 2000). In any event, as a general rule, taxpayer status is insufficient to confer Article III standing to challenge governmental expenditures, *Massachusetts* v. *Mellon*, 262 U.S. 447, 487-488 (1923), and the Establishment Clause provides no exception to that rule, *Doremus* v. *Board of Educ.*, 342 U.S. 429 (1952). In *Flast* v. *Cohen*, 392 U.S. 83 (1968), the Court held that federal taxpayers could establish Article III standing to challenge an exercise of Congress's taxing and spending power, U.S. Const. Art. I, § 8, Cl. 1, if the taxpayer asserted the violation of an express constitutional limitation on that power, such as the Establishment Clause. 392 U.S. at 102. Petitioners' Pledge policy, however, does not implicate any exercise of Congress's or petitioners' taxing and spending power. Furthermore, Newdow does not challenge petitioners' authority to lead willing children in reciting the Pledge of Allegiance if the words "under God" are excised. J.A. 47. The infinitesimally small amount of classroom time spent uttering the additional two words "under God" thus could not practicably "add[] any sum whatever to the cost of conducting the school," *Doremus*, 342 U.S. at 433, have any discernible impact on the public fisc, or inflict any "direct dollars-and-cents" injury on Newdow, *id.* at 434.

4. Lastly, amicus United Fathers (Br. 4, 19-20) paints the United States' jurisdictional arguments as unfairly closing the courthouse doors to noncustodial fathers. But the question in this case is not whether, but which, court may entertain Newdow's complaint. Newdow remains free to seek relief in the *pending* state court custody proceedings. Indeed, Newdow himself (Br. 46) describes the Family Court as the true "final decision maker" on issues concerning the child's welfare. That is correct—the state court is equally charged with upholding the federal constitution and is institutionally better equipped to assess any alleged injury to the child's or

Newdow's interests. See *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703-704 (1992). There also is an important federalism interest, rooted in the same principles that underlie the domestic relations exception to diversity jurisdiction, see *id.* at 697-704, in ensuring that federal courts not be transformed into a collateral forum for the litigation of child-rearing disputes when an *ongoing* state family court proceeding already provides an available forum for adjudication of the issue. Cf. *Rooker*, *supra*; *Feldman*, *supra*; *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976).

B. PETITIONERS' POLICY OF LEADING WILLING ELEMENTARY SCHOOL STUDENTS IN THE DAILY RECITATION OF THE PLEDGE OF ALLEGIANCE IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

To uphold the constitutionality of petitioners' Pledge policy, the Court need only reaffirm precedent that has already answered the question presented—twice. *County of Allegheny* v. *ACLU*, 492 U.S. 573, 602-603 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668, 675-677 (1984). Simply put, the Establishment Clause does not banish ceremonial references to "God" from public life. To the contrary, "[o]ur history is replete with official references to the value and invocation of Divine guidance," and "[t]here is an unbroken history of official acknowledgment by all three branches of government," as well as the States, "of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674-675. Such official acknowledgments of religion are consistent with the Establishment Clause because they quite appropriately take note of the historical *facts* that "religion permeates our history," *Edwards*, 482 U.S. at 607 (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of this Nation and in the design of its government. The Constitution does not require that public schoolchildren be insulated from those historical truths.

1. "Under God" Is An Acknowledgment Of The Historical Influence Of Religion, Not An Endorsement Of Monotheism

Newdow (Br. 9) and his amici (Am. United Br. 18-19) contend that the Pledge, with its reference to a Nation "under God," cannot be recited in public schools because the reference to "God" constitutes a governmental endorsement of Judeo-Christian monotheism. Of course, if Newdow and his amici were correct, then the Pledge could not be recited in any public setting. In school or out, the Establishment Clause would forbid such a sectarian endorsement. But they are not correct. While Newdow (Br. 31) "see[s] an onerous theocracy already in existence," this Court has been "unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government." *Lynch*, 465 U.S. at 686. That is because there is a constitutional difference between *acknowledgment* of the role that belief in "God" has played in the Nation's history, and *endorsement* of "God" or monotheism. See *id.* at 674-678.

Moreover, whether the Pledge endorses monotheism from a constitutional perspective turns upon the perceptions of an objective, reasonable observer, not on the reaction of "isolated nonadherents," or even whether "*some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring). That objective observer, moreover, is charged with an awareness of the Nation's "unbroken history," *Lynch*, 465 U.S. at 674, of similarly phrased references to the Country's religious heritage. See *id.* at 674-676; see also *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000). The reasonable ob-

server, in other words, is familiar with the "Creator" of the Declaration of Independence and the National Anthem's reference to "God," and is carrying currency in her wallet bearing the governmentally imprinted phrase "In God we trust." The "'history and ubiquity' of [the] practice" of referencing "God" or a Divine power in the singular form thus influences and informs a reasonable observer's response to the Pledge's text. *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring).[3]

Newdow contends (Br. 30) that the Pledge is not old enough to be upheld by reference to history. But that asks the wrong question. The governmental practice of officially acknowledging the role of religion in national life unquestionably dates back to "at least 1789." *Lynch*, 465 U.S. at 674. There is no requirement that each particular manifestation of that practice—each individual governmental reference to the Nation's religious heritage—have a comparable vintage. Nothing in *Lynch* suggested that the city had erected the creche display annually since the time of the Founding, yet this Court sustained it. And the display of a Menorah upheld in *County of Allegheny* only dated back to 1982 (see 492 U.S. at 582). Furthermore, the history of a general governmental practice is relevant, not because the First Amendment contains a grandfather clause, but because, as a matter of human nature, past experiences necessarily inform and influence individuals' understanding of and response to new situations. For that reason, the Pledge's reference to God, which was added 50 years ago, must be evaluated against the backdrop of a history dating back over two centuries of similar official acknowledgments

[3] Indeed, even the Universal Life Church of which Newdow is an ordained minister, see *Newdow* v. *United States*, No. 99-4136 (11th Cir. Jan. 4, 2000), slip op. 2, uses "God" in a broad and non-exclusionary sense, expressing its mission in terms of recognizing individuals' "God-given right[s]." See Banning Amicus Br. Addenda.

of religion, as well as the reasonable observer's past exposure to such religious references.

In addition to that historic practice, the Nation has an established legal tradition under which references to "God" are understood in non-exclusionary terms.[4] Half of the States' Constitutions couch their protection for the free exercise of religion in terms of a right to worship "God." See U.S. Br. App. B. Yet it is well established in practice and case law that such protections broadly embrace all religious viewpoints.[5]

Furthermore, the endorsement inquiry is grounded in social "reality," not theoretical or theological "literalness." *Lynch*, 465 U.S. at 678. While Newdow and his amici train their objections on the word "God," "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.*

[4] See, *e.g.*, *County of Allegheny*, 492 U.S. at 603 (describing reference to "God" in the Pledge as "nonsectarian"); *United States* v. *Seeger*, 380 U.S. 163, 176 (1965) (" 'God' ha[s] myriad meanings for men of faith."); *id.* at 182, 191 (discussing inclusiveness of the term "God"); Eisgruber Br. 12 (reference to "God" is "fundamentally generic and non-sectarian"); *The Papers of Benjamin Franklin* 301 (W. Wilcox, et al., eds., 1959) ("[T]he Word *God* [is] a common or general Name, expressing all chief Objects of Worship, true or false.").

[5] See, *e.g.*, *Sagar* v. *Sagar*, 781 N.E.2d 54, 58 n.3 (Mass. Ct. App.), review denied, 786 N.E.2d 395 (Mass.), cert. denied, 124 S. Ct. 228 (2003); *State* v. *Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 763-764 (Tenn. Ct. App. 2001); *People* v. *DeJonge*, 501 N.W.2d 127, 136 (Mich. 1993); *Salem Coll. & Academy, Inc.* v. *Employment Div.*, 695 P.2d 25, 37 (Ore. 1985); *State* v. *Pack*, 527 S.W.2d 99, 105-107 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976); *McMillan* v. *State*, 265 A.2d 453, 455-456 (Md. 1970); *Commonwealth* v. *Beiler*, 79 A.2d 134, 137 (Pa. Super. Ct. 1951) (state constitution protects the right "to adopt any creed or hold any opinion whatever on the subject of religion"); *Donahoe* v. *Richards*, 38 Me. 379, 409-410 (1854) (state constitution "regards the Pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Bud[d]hist, the Catholic and the Quaker, as all possessing equal rights").

at 680. Instead, the reference to "God" must be evaluated in light of the surrounding text, the historic understanding and use of the Pledge, and its role in public school classrooms. *Id.* at 679. When read as a whole, the Pledge is reasonably understood, not as establishing a state religion, but as celebrating and affirming the Nation and the historical forces and ideals that formed its unique character.

More importantly, children do not just recite the Pledge and go home. The Pledge is "integrated into the school curriculum," *Lynch*, 465 U.S. at 679 (quoting *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)), where students spend months and years studying and learning about the historical, philosophical, and religious foundations of the Nation and the governmental structure that was adopted. See U.S. Br. 47-48 & n.30; Nat'l Sch. Bd. Br. 9-20. In that regard, the Pledge stands in marked contrast to the graduation and football prayers invalidated in *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe*, *supra*, where the challenged prayers were not part of a secular educational process. Here, a reasonable observer's response to the Pledge's reference to a Nation "under God" will be assimilated in the larger curricular framework that gives meaning to all of the Pledge's language.

In fact, studies cited by amicus Americans United for Separation of Church and State (Br. 13-14 & n.5) prove the point. They document that individuals who are trained in educating young children value the Pledge as a pedagogical tool *not* for teaching religion, but for instructing students of all ages about national values, civic duty, and tolerance. Federal courts are ill-equipped to second-guess that expert judgment. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school

system of the Nation raises problems requiring care and restraint.").[6]

Americans United's assertion (Br. 13) that "[s]ocial science research" documents children's perception of "'under God' as expressing religious belief" seriously overstates the case. While some children perceived the Pledge as a prayer, others in amicus's studies did not.[7] Indeed, amicus's own studies document that the overall curricular context—in which the Pledge is recited in conjunction with the study of civics and national history—leads students to view the Pledge and its text in purely patriotic terms. Freund & Givner, *supra*, 13-18. In any event, this Court has refused "to employ Establishment Clause jurisprudence using a modified heckler's veto," in which governmental action "can be proscribed on the basis of what the youngest members of the

---

[6] See E. Freund & D. Givner, *Schooling, The Pledge Phenomenon & Social Control* 13 (U.S. Dep't of Educ. Apr. 1975) (discussing the Pledge's value to young children "as a day-beginning ritual"); R. Hess & J. Torney, *The Development of Political Attitudes in Children* 106, 108 (1967) ("This early orientation prepares the child for later learning and stresses the importance of loyalty for citizens of all ages."); C. Seefeldt, "*I Pledge . . .*," 58 Childhood Education 308 (May/June 1982) ("[M]any teachers still maintain that recitation of the Pledge is an important activity" as they "[p]repar[e] children to become constructive, participating and patriotic citizens."); see also New York State Comm'n on the Bicentennial of the U.S. Const., *Living Together Constitutionally: An Elementary Education Citizenship Guide Based on the Pledge of Allegiance* 1 (S. Schechter & A. Gallagher eds., 1990) ("Understanding this simple document can also help lay the foundation for future understanding of more complex documents, such as the Declaration of Independence and the United States Constitution."); Kansas State Dep't of Educ., *A Program for Providing Patriotic Exercises and Instructions for Flag Etiquette, Use, and Display* 4-6 (Aug. 2001).

[7] See C. Seefeldt, *supra*, at 308 ("'Well, I think it's like a prayer to God,' explains one girl. 'No, no,' another attempts to clarify, 'it's a song, that's all, just a song.'"); Freund & Givner, *supra*, at 10-11 (Pledge described by young students as a "poem" and a "song").

audience might misperceive." *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 119 (2001). Moreover, if any student were to mispercieve the words "under God" as endorsing religion, the remedy would be to instruct students about the Pledge's true meaning, not to strike the words "under God." See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("[P]etitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students."); *Texas* v. *Johnson*, 491 U.S. 397, 419 (1989) ("'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'").

2. No Unconstitutional Coercion Results

Central to the court of appeals' holding (Pet. App. 13-14) and Newdow's argument (Br. 15-16, 29, 37-38) is the contention that the Pledge must (unless amended) be banned from public school classrooms because it coerces children into affirming its religious reference. But unconstitutional coercion does not result every time that schoolchildren (or their parents) are merely exposed to a school's curriculum or classroom activities that they find objectionable. Compulsion, at some level, is an inherent component of the public school classroom, from required math tests, to behavioral rules, to officially-directed activities.

That routine classroom dynamic is transformed into unconstitutional coercion only when school officials compel students "to confess by word or act" their adherence to a governmentally prescribed "orthodox[y] in politics, nationalism, religion, or other matters of opinion." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). In addition, *Barnette* made clear, with specific reference to the Pledge of Allegiance, that it is only compelled recitation of the Pledge without the possibility of opting out—the coerced "confess[ion] by word or act" (*ibid.*)—that transgresses constitutional bounds. Mere exposure to classmates reciting the Pledge, with its attendant peer pressure to participate, does not rise to the level of constitutionally proscribed coercion. *Id.* at 630.

In that way, *Barnette* struck a constitutional balance between the individual student's right of conscience and the school's vital interests in fostering "[n]ational unity * * * by persuasion and example," 319 U.S. at 640, "prepar[ing] pupils for citizenship in the Republic," and teaching "the shared values of a civilized social order," *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681, 683 (1986). That balance has worked successfully for more than half a century to protect the Jehovah's Witnesses' (and others') conscience-based objections to the Pledge. Nothing in Newdow's or his amici's arguments explains why it does not work equally well for the children of atheists. See United Fathers Br. App. 7a (quoting petitioners' policy prohibiting behavior that "insults, degrades or stereotypes" students on the basis of religion). Whatever "awkward[ness]" (Rev. Bailey Br. 14) might attend declining to recite the Pledge or omitting the word "God," "[t]here are countervailing constitutional concerns related to rights of other individuals in the community" that counsel against banishing the Pledge from public school classrooms. *Good News Club*, 533 U.S. at 119; see *Board of Educ.* v. *Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) ("[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and * * * for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'").

Newdow and his amici invoke this Court's decision in *Lee*, *supra*, which invalidated graduation prayers because of their unconstitutionally coercive effect on students. But *Lee* did not overrule *Barnette*. Rather, the different outcomes in *Barnette* and *Lee* turned upon the qualitatively different character of the governmental activity to which the students

were exposed. The Court's decision in *Lee* repeatedly emphasized that it was the State's engagement in a "formal" and "overt religious exercise," 505 U.S. at 586, 588, that made even exposure to the prayer unconstitutionally coercive. The Court stressed that "[p]rayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592.

The Pledge is not a prayer or other type of overt religious exercise, and its reference to "one Nation under God" is not sacred text. Like singing the National Anthem or memorizing the Gettysburg Address, reciting the Pledge is a patriotic, not a religious, exercise. Amicus Anti-Defamation League (ADL) stresses (Br. 22) that the Pledge, by its nature, "requires affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S. at 633. It no doubt does, just as it did in *Barnette*. But the belief and attitude are ones of allegiance towards the flag and the Republic for which it stands, as another of Newdow's amici concedes (Eisgruber Br. 5). The phrase "under God" is, in this Court's own words, a secular "reference to our religious heritage," *Lynch*, 465 U.S. at 676, rather than the type of overt religious activity that triggers *Lee*'s specialized coercion concerns.

ADL further contends (Br. 18) that *Barnette* is distinguishable because it involved a free speech claim, and the government has greater freedom to express its own views under the Free Speech Clause because there is no political speech counterpart to the Establishment Clause. That is true, but constitutionally irrelevant, for three reasons. First, for more than 200 years, the government's right to speak has included a right to acknowledge the religious heritage of the Nation. See *Lynch*, 465 U.S. at 674-686.

Second, while the claim in *Barnette* was discussed in free speech terms, the Jehovah's Witnesses' objection to reciting the Pledge was grounded in their religious views, just like Newdow's. See *Barnette*, 319 U.S. at 633 & n.13. The

Jehovah's Witnesses faced the identical "participating * * * or protesting" dilemma (Pet. App. 13) that the court of appeals held in this case gives rise to unconstitutional coercion. So if, as amici suggest, the outcome of *Barnette* was just an accident of pleading a Free Speech rather than a Free Exercise or Establishment Clause violation, Jehovah's Witnesses or any other conscientious objectors to the Pledge will have just as much right to exile the Pledge from public schools as Newdow claims, and they may do so whether or not the Pledge includes a reference to God. Newdow's amici admit as much. ADL Br. 16; Am. Humanist Br. 17.

Third, and relatedly, whatever freedom the government has to *speak*, government has no greater license to *coerce* political orthodoxy than religious orthodoxy. *Barnette* made that clear: No government official "can prescribe what shall be orthodox in *politics, nationalism, religion, or other matters of opinion* or force citizens to confess by word or act their faith therein." 319 U.S. at 642 (emphasis added); see also *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Thus, once again, if Newdow and his amici are correct that mere exposure to the Pledge unconstitutionally coerces children to profess a religious (or political) belief, within the meaning of *Lee*, then the Pledge cannot remain in public schools in any form.

That would be a radical expansion of this Court's precedents—one that *Lee* expressly disavowed. "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive." 505 U.S. at 597. Quite the opposite, the Court stressed that "tolerance presupposes some mutuality of obligation." *Id.* at 590-591. With respect to the Pledge of Allegiance in public schools, that mutuality of obligation has been successfully choreographed by *Barnette*'s opt-out policy for more than half a century, and there is no sound reason for the Court to dramatically recalibrate that balance now.

3. Petitioners' Pledge Policy Has A Secular Purpose

Newdow (Br. 9-12) and his amici (Am. United Br. 19-27) exert substantial effort attacking the legislative history of the Pledge's reference to "God." The relevant inquiry, however, is whether petitioners' Pledge policy has a secular purpose, and Newdow does not dispute that it does (Br. 13-14). In any event, the analyses of the Pledge's legislative history show, at most, that some Members of Congress were motivated to vote for the amendment, in part, by religious considerations. Beyond that, the arguments fail to prove, as the Establishment Clause requires, that the addition of "under God" was "wholly," *Lynch*, 465 U.S. at 680, and "entirely motivated by a purpose to advance religion," *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). And this Court's discussion of the Pledge in both *Lynch* and *County of Allegheny* readily identified a valid secular purpose for the amendment: it is a permissible acknowledgment of the religious heritage that heavily influenced the founding, structure, and design of the Nation's governing institutions. Further, to the extent that congressional purpose is even relevant to the constitutionality of petitioners' policy, it is the purpose of the current Congress to *retain* the Pledge intact that is at issue. *McGowan* v. *Maryland*, 366 U.S. 420, 434, 449 (1961). Newdow has offered nothing to suggest that Congress's present-day purpose is wholly religious. Nor could he. See U.S. Br. 37-38 & n.25.

Newdow also stresses (Br. 21-22) that the Pledge originally was enacted without the reference to God. "[T]hat is irrelevant." *Lynch*, 465 U.S. at 681 n.7. The Establishment Clause contains no least-restrictive-means requirement. *Ibid.* (summarily dismissing the argument that "the city's objectives could have been achieved without including the creche in the display"). If it did, no reference to religion in public life and few voluntary accommodations of religion (such as the tax exemption in *Walz* v. *Tax Commission*, 397

U.S. 664 (1970), or the early-release program in *Zorach* v. *Clauson*, 343 U.S. 306 (1952)) could withstand scrutiny.

The notion (Eisgruber Br. 12-15) that the government could have one Pledge of Allegiance, which omits "God," for public school classrooms while retaining the current Pledge for all other occasions, is untenable. First, the Pledge cannot serve its purposes of unifying and commonly celebrating the national identity unless it is one Pledge with one content for all citizens at all points in their lives. Second, over the last half century, the text of the Pledge of Allegiance, with its reference to God, "has become embedded" in the American consciousness and "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Millions of children have memorized it, and compelling them now to redact "under God" when in school would communicate to those children a level of selective and targeted hostility to religion that would itself raise Establishment Clause concerns. "A secular state, it must be remembered, is not the same as an atheistic or antireligious state." *County of Allegheny*, 492 U.S. at 610; see *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (government may not treat religion "as subversive of American ideals").[8]

In short, petitioners' Pledge policy is constitutional because "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in

---

[8] Likewise, the suggestion (Rev. Bailey Br. 29) that recitation of the Pledge be accompanied by some form of *Miranda* warning, whereby teachers advise students that "You have the right to remain silent * * *," unnecessarily injects the federal courts into day-to-day classroom management. See *Pico*, 457 U.S. at 864 ("federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems") (internal quotation marks omitted).

the favoring of religion as to have meaningful and practical impact." *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring). The balance that this Court struck in *Barnette* between individual students' rights of conscience and local school districts' vital interest in instilling civic and patriotic values works just as well for atheists as it has for 50 years for Jehovah's Witnesses and other conscientious objectors. And while Newdow and his amici fear the establishment of Judeo-Christian monotheism, the reality is that religious pluralism has flourished in the half century since "under God" was added to the Pledge. See Seattle Atheists Br. 15; Scholars Br. 23. There is room in the Establishment Clause to recognize that reality, and thus to permit the government to continue to acknowledge the singularly influential role that religion has played and continues to play in the Nation's history and character, and to allow the Nation's schools to share that heritage with their students.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be vacated with directions to dismiss the complaint for lack of standing or lack of jurisdiction. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MARCH 2004

APPENDIX A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF SACRAMENTO

Case No. 99FL04312

IN RE MATTER OF
SANDRA L. BANNING, PETITIONER

v.

MICHAEL NEWDOW, RESPONDENT

FINDINGS & ORDER AFTER HEARING

[Filed Jan. 9, 2004]

This matter came on regularly for trial for a ten-day period between August 4, 2003 and ending on September 11, 2003, in Department 38 of the Court shown above, the Honorable James Mize presiding. Petitioner was present and was represented by her attorney, Dianne M. Fetzer. Respondent was present in propria persona. Oral and documentary evidence was received, arguments were made on behalf of both parties, and the matter was submitted for decision on September 11, 2003. The Court, having orally announced its Decision in open Court on September 11, 2003, in the presence of both parties and counsel.

The Court, for this phase of the trial and by stipulation, is bound by the standard of the best interests of the child and

therefore must balance and weigh the evidence before the Court when ultimately reaching a decision as to the appropriate custodial and parenting plan for the minor child.

A. The Court makes the following findings:

1. It is disingenuous for Father to hold the conclusion that Mother somehow raped Father. There is no evidence that the Mother could have physically controlled the Father. Father could have avoided having sex. Once Father decided to have sex, he accepted all the responsibilities for the minor child including raising and caring for her, as well as the ramifications of dealing with Mother. In order to talk effectively with each other and work together as parents, Father needs to quit blaming Mother for giving birth to the minor child. It took both parties to conceive this minor child and both are responsible; each must accept this responsibility and the child.

2. During the minor's first four years of life, Mother was the primary custodial parent. Father admitted that he did not believe it was necessary for him to be around that much during that period of the minor's life, as a child does not remember much. This point is incorrect, as the first four years of a child's life is very important for bonding with a parent. The first four years of the minor's life established a pattern of noninvolvement that was not a joint custodial relationship.

3. Ms. Banning needs to understand that although Dr. Newdow was not much involved in the minor's life during her first four years, the fact that he now wants to be active is in the child's best interest. If a parent wants to become involved in the minor's life, even if late in the child's life, the Court will encourage that involvement. The Court will proceed gradually to make sure the child understands what is going on; this cannot be accomplished by a "flip of the

switch", as children aren't channels nor scientific instruments that can be turned on or off. Dr. Newdow needs to understand that a 50/50 parenting plan, even if ultimately appropriate does not generally happen overnight.

4. It takes both parties to parent effectively; the burden is on both parents not just one. Both Mother and Father provide something to the minor that the other party does not have; this is beneficial to her. The following are a few of the positive and negative behaviors of the parties that affected the Court's decision:

a. Dr. Newdow failed to recognize the child development concepts associated with the minor child initially having difficulty with overnights. The minor child had developed the routine of being with Mother most of the time and did not immediately feel comfortable with spending the night away from Mother in the beginning. Under Family code section 3020, the minor child should have frequent and continuing contact with the both parents. Less than a 50% parenting is frequently in the child's best interest. The Court must base the parenting time on the child's developmental needs, the parenting skills of the parties and the history of the relationship between the parties and the parties with their child.

b. The Court notes that Dr. Newdow has a combative style, which which would likely discourage communication between these parents. The minor would do better if a more cooperative method were utilized instead of a litigious and combative method. Eventually the minor will be affected by this continued battle, if it has not already affected her.

c. Dr. Newdow's suggestion for the minor to alternate between the east and west coast every two weeks for kindergarten was developmentally inappropriate. This was not a good proposal; it may have caused a certain amount of

angst and perhaps expenditure of funds, whereas someone with a little more understanding, thoughtfulness, and attunement to a child would have realized this was not really going to work, particularly considering the dysfunctional relationship of the parties.

d. The biggest problem with the bathroom incident is that it clouded Dr. Newdow's ability to see other things. Dr. Newdow was correct with regard to the bathroom incident. This bathroom incident does not indicate negligence, malfeasance, or poor parenting; it was an appropriate decision that he made at the time. This issue is in the same category as "not holding the child's hand when crossing the street and praising her for it." Dr. Newdow does not have any interest in having the minor child injured and will not do anything intentionally to make the risk very high.

Mother needs to let the child go during Father's parenting time and ultimately realize that Dr. Newdow needs the freedom not only to do the things that he wants to do, but to make the same kinds of mistakes that Mother did in the first few years of her life so that he can learn about raising a child. Today, Ms. Banning has a better feel for the way the child is thinking or feeling. Dr. Newdow brings spontaneity and maybe a little bit of risk activity to the child's life. Part of this is delightful for a child and helps the child evolve and develop.

Dr. Newdow also needs to understand that the protectiveness by Ms. Banning is not an indication that she does not want him to be with the minor child. He needs to be more understanding and tolerant; Ms. Banning is not trying to hurt Dr. Newdow or the minor child. She is merely coming from a place that is very different from Dr. Newdow, just as he is coming from a place very different from her. Just as Ms. Banning has to understand that she must let Dr. Newdow have the freedom to do things that she may believe

to be a little risky, Dr. Newdow must be sensitive to these feelings and that these slightly risky things may make mother feel uncomfortable. It is not who is objectively correct since there is some risk involved in all human endeavors, it is, instead, a question of how parents can get along for the welfare of their child. The concept of understanding what the other person may feel and think, and then responding to that understanding, is the heart of interpersonal relations. While a party may feel that he or she is correct, the question really becomes: Does the battle itself cause more harm than proving you are right?

Ultimately, co-parent counseling is needed in this case. Had the parties willingly participated in such counseling years ago, they may have been able to save $300,000 and the parties would certainly be much happier.

e. Dr. Wagner over emphasized the injury incident on the fan. Children are going to get injured just in living. This did not indicate bad parenting and Dr. Newdow corrected the problem. In addition, there was nothing wrong with the minor walking on the iron beam without holding her hand, as he was standing there underneath. The roof incident is similar. Dr. Newdow is not going to risk this child's life. These items were not significant, but here again, it is not the objective evaluation of the situation, but the other party's response to it that matters. The appropriate co-parent would say: "I'm sorry; it will not happen again, I promise you." Then, don't ever do it again, not because objectively it might be over some objective risk level, but because the activity was beyond the reasonable, subjective risk level tolerence of the other parent. Ms. Banning's concerns are absolutely reasonable and appropriate. Co-parenting requires a sensitivity to her objection to the risk that she perceives and the ability to respond appropriately to say that it will never happen again, and ensure that it does not.

f. With regard to the car incident and whether or not the minor should be placed in the rear seat instead of the front seat, Dr. Newdow exercised poor judgment. Dr. Newdow missed the point when he provided Ms. Banning with research to the contrary instead of merely recognizing her concerns and addressing them appropriately. The objective correctness of the number of deaths having to do with car seats is not the point. Given the conventional wisdom among parents that it is safer to place children in the back seat, Dr. Newdow should have acquiesced to the Mother's reasonably held concerns. Unfortunately, it appeared that it was more important for Dr. Newdow to prove himself correct than to have a more expansive relationship with the minor child.

g. Having friends over for the minor is not a problem nor an indication that Dr. Newdow does not want to spend time with the child. This provides the father with an opportunity to be able to nurture the child, and to teach the child proper manners, customs and relationships with other children. It is necessary for him to see his child's interplay with other children to be sensitive to teaching the minor appropriately.

h. With regard to the Pledge case, to blame Mother for the impact of this case on the minor child is disingenuous. Mother would not have been involved had the child not been in the middle of a very significant case and named as a party. To say that nobody would have been able to know who she was or how to find her is inaccurate. Any investigator could trace her to the Elk Grove School and find out her name, long before Ms. Banning said anything.

The order allowing the minor to attend the Ninth Circuit argument was appropriate, as this was an event good for a child to experience. However, to have included the minor child in the Pledge action without first clearing it with the other joint custodial parent is unconscionable co-parenting,

especially when Dr. Newdow believed that there was a risk of injury or death to the minor in doing so.

i. Dr. Newdow's focus on the pioneer plant incident and his correction of Ms. Banning's grammar was inappropriate and does nothing but demean and intimidate her. Further, this behavior did not further a good trusting relationship. Different people may be skilled in many different ways. Because one parent may perceive himself as having certain talents in some areas, he may not then conclude that the other parent cannot teach him useful parenting skills in other areas.

j. Ms. Banning's washing the minor's mouth out with soap was not recent but was nevertheless, inappropriate.

k. On direct and cross examination, Ms. Banning was centered, balanced, understanding, and very sensitive to the needs of the minor child. The Court found Ms. Banning to be more likely to understand the Court's retorical [*sic*] question: would you ever stop this whole process and give up and just give him what he wants because of the pain or the injury it might cause the minor?

On several occasions where she did something wrong, e.g., crying at the doorstep when transferring the minor, she adjusted her behavior when told by Ms. Hancock she needed to do so. What the Court is looking for is not whether a party makes mistakes, but whether that party has the wherewithal to make the changes to himself/herself to correct those mistakes.

l. When Dr. Newdow took the minor child to the hospital, he should have called Mother immediately. He would have expected the same consideration.

m. Another example of poor communication occurred over the issue of the splint. Ms. Banning needs to be more cognizant that Dr. Newdow is a physician, loves the minor

and would not place her at a medically unreasonable risk of harm. In addition, Dr. Newdow needs to understand that Ms. Banning received a different opinion from another doctor that Dr. Newdow's behavior could be inappropriately risky. Both of the parents in this case were right and wrong at different stages.

n. Dr. Newdow's comments to Ms. Banning regarding child support, his questioning her as to where the money was being spent, were legally unreasonable and demeaning[.] Dr. Newdow's inquiry as to these monies would only make Mother feel like a lesser parent.

5. Dr. Kaufman testimony was of little assistance to the court. Among other things, he drew conclusions that were inconsistent with some of his other observations and/or musings. He wrote certain seemingly important things in his notes and then testified that the notes had no meaning whatsoever. His first observation, which he seemed to reverse at some point in his inquiry, was consistent with all other experts in this case including this court in that he found Dr. Newdow to have an inability to co-parent. In addition, the Court found Dr. Kaufman to be excessively evasive and inconsistent at times. He cited his own data to support different, mutually exclusive conclusions at different times. There was little data that supported Dr. Kaufman's ultimate recommendations made in open court and quite a bit of data that supported his earlier statements (and tentative conclusions?) that this case clearly demands sole custody and that nothing else is going to be able to work for these parties. Dr. Kaufman's notes are consistent with what most of the other psychologists have said, e.g. that Dr. Newdow is egocentric and narcissistic, etc. This does not mean that he is psychotic, only that these standard neuroses need to be addressed for co-parenting to work.

6. The Court found Ms. Banning to be very sensitive, very intelligent and very logical in dealing with the minor child.

7. Dr. Nicholas's comments about Dr. Kaufman's report for the most part were an accurate assessment of items that make up a good report and accurate criticism of some of the things that he said, but there were also some things he said with which the Court disagreed.

8. Dr. Nicholas and Dr. Kaufman both recommended co-parenting. The Court also believes that Dr. Wagner may have done so as well. The Court concurs. While neither parent has commented negatively about the other parent in front of the minor, both parties have made it clear that the minor is aware that each parent has less than positive feelings for the other. She will pick up these unsaid feelings more as time goes on if the parties do not change their co-parenting routenes [*sic*].

9. The Court was very concerned about Dr. Newdow's statement that "his life is ruined as a result of having less than 50/50, that it's ruined his relationship with his child." If he continues to feel that psychologically impacted by the process of developing co-parent skills, those inappropriate feelings will eventually be recognized by the child and will be a negative force on her psychological wellbeing.

10. While Dr. Newdow has stated that he could never trust Ms. Banning, there are ways of co-parenting where one can achieve some level of acceptance of how the other person is going to respond and act. Co-parenting can help teach this, if a party is willing to learn.

11. Ms. Banning's emphasis upon the "warm fuzzies" is important, as this helps the minor child move from one stage in life to another.

12. It is the job of a good parent to be able to not only do what's right for the child, but also to be able to respond to the feelings of the other parent. While one may be technically or academically right, frequently it is important to forego the fight in order to be able to save the minor child and keep the minor child from feeling like she is in the middle of a battlefield.

13. While the Court would have appreciated a current evaluation by a qualified expert, the Court has sufficient information regarding the parties' interpersonal relationship to reach a conclusion. The child is developing and is old enough now to extend additional time to Father. Not only is she capable of spending more time with Father, but she would likely benefit from this time.

14. The Court finds that there has been a pattern of success with the current school schedule and therefore is not altering it, but is providing Father with additional time during off-track periods with Mother having more time during the on-track periods.

The Court believes that the custody orders should be changed. Dr. Newdow should have a major say in the education and health decision, however, the Court is going to create the same orders as those currently in place. The Court advises that it is making this order which provides Mother with the final decisions because it finds that the parties are not able to co-parent effectively.

RESPONDENT'S OBJECTIONS TO STATEMENT OF DECISIONS

Respondent has submitted to this Court a 54 page plus 4 page Appendix Objection to the 12 page Findings and Order After Hearing as proposed by Petitioner's counsel. The Court has made significant changes and modifications to that

proposed Findings and Order to reflect more accurately the Court's decision in this case.

With respect the remaining arguments in Respondent's Objection to Statement of Decision, the Court would note that many of the statements in the Objection are references to the Constitutional questions which have been deferred in this case and will be tried at a later time. Much of the remaining portion of the objection is not a true objection to Statement of Decision but is in fact re-argument of the case. Many of the arguments were previously directly addressed by the Court at Trial.

In addition, as the Court commented in open court at the last hearing, Respondent is prone to hyperpolic [*sic*] in his arguments. While it is certainly customary for counsel to be strong advocates of their clients' positions and while it is common for self represented clients to state hyperpolic feelings rather than accurate facts, it is not helpful for otherwise competent attorneys to use language that is factually exagerated. When counsel does this, he or she can sometimes divert attention of the Court away from potentially valid factual disputes.

The thrust of Dr. Newdow's objection is that he believes the Court found that he is a "bad parent" and the Petitioner Ms. Banning is a "good parent". (e.g., see page 47, paragraph 40) The Court was careful to note all of the positives and negatives the Court could practically discern regarding both parties. In fact, had the Court not seen the value of the Responent's parenting skills, the Court would not have expanded his visitation in the current order. Respondent does not seem to recognize the expansion of his custody time and the recommendations that the Court made for expanding the custody time further. Instead, Dr. Newdow has focused on the fact that by not getting 50/50 custody he is being somehow told he is "bad parent". This is disappointing

if it means that the Respondent may not choose to take the recommendations of the Court in order to expand the custody time which the Respondent indicates he wished to do.

Finally, Respondent's Objection on page 50, "the reality is that the entire statement was addressed to Newdow . . ." The Court would suggest that the Respondent re-read the Statement and focus on both the positive characteristics noted by the Court regarding the Respondent as well as the positive and negative characteristics noted about the Petitioner. It is only with a de-escalation of such egocentrism and inaccurate exaggeration of the facts that the parties will be able to achieve a resolution favorable to [name deleted].

B. The following are the orders of the Court:

1. Custody:

The parties will have joint legal custody defined as follows: Ms. Banning will continue to make the final decisions as to the minor's health, education, and welfare if the two parties cannot mutually agree. The parties are required to consult with each other on substantial decisions relating to the health, education and welfare of the minor child, including but not limited to the non-emergency major medical care, dental, optometry, psychological and educational needs of the minor. If mutual agreement is not reached in these areas, then Ms. Banning may exercise legal control of the minor that is not specifically prohibited or is inconsistent with the physical custody order.

2. Parenting Plan:

A. On-Track Periods:

Father will have the first, third and fifth weekends for each on-track month from Friday after school until Monday

at school. If for some reason there is no school, then the transfer back to Mother will be at 10:00 a.m. The fifth weekend is defined as any weekend of a month where there is a fifth Friday.

B. Off-Track Periods:

Each party will alternate each week from the date that minor is out of school (off-track) with exchanges taking place at 10:00 a.m. the following week. If there are extra days, these days will be split between the two parties equally. The parties may mutually agree to another parenting plan other than alternating weeks.

3. Co-Parent Counseling:

The parties shall immediately attend co-parent counseling with a mutually agreed upon therapist. The parties have agreed to use Frank Leek, Ph.D. as their co-parent counselor. Said counseling shall be non-confidential. If Dr. Newdow wants to implement the additional parenting hours as set forth below, the Court wants first to see the parties co-parenting effectively. This means that both parties must learn to be sensitive to the emotions, feelings and concerns of the other party and learn to respond appropriately to those human emotions, feelings and concerns. The Court orders four months of co-parenting counseling or less if the therapist determines that the parties have successfully learned the necessary co-parenting skill. Said counseling to be completed by the end of the six-month period by aproximately March 12, 2004.

4. Phone Calls:

There is no need for daily phone calls to the minor, as she is old enough to be away from each of her parents for a couple of days. The minor child may call whenever she

wants, but the parents should call only once every two or three days.

5. Holidays:

The parties shall keep the prior holiday schedule.

6. Return Date for Review of Co-Parenting:

The parties are scheduled to return for review of the effectiveness of the parties' ability to co-parent on March 12, 2004 in Department 123 at 9:00 a.m. At that time, if the Court finds that the parties are effectively co-parenting, the Court will increase Father's off-track parenting time by adding two additional weeks (one each) in two of the off-track periods. During the two off-track sessions where Father will have three weeks of parenting time, Mother may choose which week that she wants to have with the minor or she can chose to split up her days in a maximum of three blocks or otherwise as the parties agree.

If both parties agree that there is no need to return at the end of the six month period, as they believe that they are effectively co-parenting, the parties shall contact the Court, advise the Court that a return is not necessary, and enter a stipulation to change the order to reflect their agreement.

The Court is not going to make this order a final order under *Montenegro v. Diaz*, (2001) 26 Cal. 4th 249, but will consider this at a later date, as the Court is quite familiar with the circumstances of this case.

C. Attorney Fees & Costs/Sanctions:

The Court defers this issue to the next hearing on October 24, 2004 at 9:00 a.m. in Department 123.

D. All other issues are reserved until further order of the court.

Approved as to Form:

_____
MICHAEL NEWDOW,
Respondent
November 4, 2003

Subject to objections
upon the Court's signing.

ORDER

IT IS SO ORDERED.

Dated: January 9, 2004

/s/ JAMES MIZE
JAMES MIZE
JUDGE OF THE SUPERIOR COURT